NG KIM HUAT v. PUBLIC PROSECUTOR

[A. Cr. J. (Thomson C.J.) June 5, 1961]

[K.L. — Johore Bahru Criminal Appeal No. 6 of 1961]

Customs and Excise — Carrying "dutiable goods" without permission of Comptroller — Conveying uncustomed goods with intent to defraud the Government — Failure to report arrival of vessel — Customs Ordinance, 1952, ss.34(1)(a), 47(1) and 131(1)(c) — Observations on statutory presumptions.

The appellant was the captain of a motor vessel which had anchored off the Sungei Malaka. The arrival of the motor vessel was not reported to the Customs Authorities and when boarded by them was found to be carrying cargo consisting of rubber, coffee, groundnut oil, margarine and cooking oil. The appellant was charged with carrying dutiable goods in a local craft otherwise than with the permission of the Comptroller of Customs and was convicted. On appeal,

Held: as the goods were *bona fide* in transit and not imported it was no offence to carry them in a local craft.

Per Curiam: "There was no evidence on which it could be said there was an apparent unlawful purpose involved in the vessel lingering: that if there was no apparent unlawful purpose in the lingering then she was not hovering; that if she was not hovering there was nothing to show that the goods on board were uncustomed; that if the goods were not uncustomed and if they were *bona fide* in transit they were not imported; that there was nothing to suggest that they were not *bona fide* in transit; that if they were not imported they were not dutiable goods; and that if they were not dutiable goods it was no offence to carry them in a local craft."

CRIMINAL APPEAL.

L. Rayner for the appellant.

Hamzah bin Dato' Abu Samah (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Thomson C.J.: This is an appeal from a decision of the Sessions Court, Johore Bahru.

The appellant was the taikong or captain of a motor vessel No: PPc 1230 registered in Indonesia. Three other men, who were tried with him but acquitted, were members of the crew.

At about 10 o'clock in the morning of 3rd January, 1960, the vessel was found anchored off the mouth of Sungei Malaka at the Customs Port of Kukup. Her arrival had not been reported to the Customs Authorities, but when boarded by them she was found to be carrying about 13½ tons of cargo consisting of rubber, coffee, groundnut oil, margarine and cooking oil. It is clear that all these goods had been shipped from somewhere in Indonesia but there was no manifest and indeed there were no papers of any sort except the Indonesian Registration Certificate of the ship.

The ship and cargo were seized and the captain and crew arrested.

In the event the captain and crews appeared in the Sessions Court at Johore Bahru on a charge of being knowingly concerned in conveying uncustomed goods with intent to defraud the Government of import duties in contravention of section 131(1)(c) of the Customs Ordinance. On that charge they all claimed trial and the case was adjourned. Later the charge was amended to one of carrying dutiable goods in a local craft otherwise than with the permission of the Comptroller of Customs in contravention of section 47(1) of the Customs Ordinance. The new charge on which they were actually tried was as follows:—

"That you, (1) Ng Kim Huat, (2) Ng Ho Soon, (3) Ng Swee Huat and (4) Tan Lie An, at about 10.30 a.m. on 3.1.60, at the Customs Port of Kukup, Kukup Village, Johore did carry dutiable goods, to wit, 8½ tons of rubber, 12 bags weighing 2,000 lbs. coffee seeds, 15 drums weighing 3,000 lbs. groundnut oil, 20 sacks weighing 3,000 lbs. Margarine and 10 tins weighing 240 lbs. cooking oil, in a local craft, to wit, Motor Kotak No: PPc 1230, otherwise than with the permission of the Comptroller of Customs, Federation of Malaya, contrary to section 47(1) and punishable under section 134 of the Customs Ordinance, 1952."

There was also an additional charge against the appellant only for failing to report the arrival of the vessel to the proper officer of customs in contravention of section 34(1)(a) of the Ordinance.

At the close of the case for the prosecution the learned President held that on the charge in contravention of section 47(1) there was no case for any of the accused to answer and he accordingly acquitted them all. The present appellant thereupon withdrew his plea of not guilty to the charge of failing to report and pleaded guilty on which he was convicted and fined $700. No order of forfeiture was made and it was ordered that the exhibits, which included the vessel and the cargo, should be released to the appellant.

The prosecution then appealed against the acquittal of all four accused on the charge under section 47(1) and Adams J. set aside the order of acquittal and ordered that the accused be retried.

In accordance with that order the appellant and his crew again appeared in the Sessions Court at Johore Bahru presided over by a different President and ultimately the three members of his crew were acquitted but he himself was convicted and fined $800. An order was made for "confiscation" of the boat and cargo.

Against that conviction and sentence the appellant has now appealed.

Many of the actual grounds of appeal are without substance.

On the strength of a stupid clerical mistake in the text of the grounds of judgment supplied by the President it has been argued that he did not apply his mind to the actual charge before him but to the original charge that had been amended at the beginning of the first trial. The President has supplied a full explanation of this clerical error and in any event every sentence of his grounds of judgment makes it clear that he was well aware of the charge to which he was applying his mind.

In the second place, it was said (though the point was not raised at the trial) that it had not been proved that the ship involved in the case was a "local craft" which is defined by section 2 as a vessel under 75 net registered tons Here there was ample evidence and it was all one way. A senior customs officer who saw the ship said that it was under 75 tons and the Indonesian Registration Certificate makes it clear that by United Kingdom reckoning, which is the appropriate standard (see Ordinance No. 70 of 1952, section 66), her gross registered tonnage is 17.01 from which it follows that her net registered tonnage cannot be more than that figure and *a fortiori* must be less than 75.

If these grounds of appeal covered all the issues in the case that would be the end of the matter and the appeal could safely be dismissed.

But they do not.

The Customs Ordinance, 1952, is not very easy to understand. Many of its provisions are only comprehensible after reference to a long series of definitions, many of them very artificial, contained in the interpretation section and there are a number of "reversal of onus" provisions which are sometimes not very easy either to follow or to apply. The following, however, is I think a correct analysis of the provisions of the Ordinance which are relevant to the present case.

Under section 47, it is an offence to carry "dutiable goods" in any local craft (i.e. a vessel under 75 net registered tons) except with the permission of the Comptroller of Customs.

By section 2 "dutiable goods" are "goods subject to the payment of customs duty and on which such duty has not yet been paid". By section 10 customs duties may be levied on goods "imported into or exported from the Federation". It is thus clear that the same goods may at different stages of their existence be "dutiable goods" and goods which are not "dutiable goods". I buy a bottle of whiskey in England. At that stage it is not "dutiable goods" within the meaning of the Ordinance. I then import it (I am coming to the meaning of import) into the Federation and it becomes "dutiable goods". I then pay duty upon it and it ceases to be "dutiable goods". It is only "dutiable goods" between the moment when it is first imported and the moment on which duty is paid. In other words, before goods on which customs duties have been levied can be described as "dutiable goods" for the purposes of the Ordinance they must comply with both of two conditions. One is that they must have been imported, and the other is that duty must not yet have been paid on them.

Now, "import" means to bring into the Federation, but that definition is subject to the following qualification:—

"Provided that goods *bona fide* in transit, including goods for transhipment, shall not, for the purpose of levy of customs duties, be deemed to be imported unless they are or become uncustomed goods."

"In transit" means taken from any other country and brought into the Federation for the sole purpose of being carried to another country and "uncustomed goods" are goods in respect of which a breach of the provisions of the Ordinance has been committed. All these definitions are to be found in section 2.

The only other provision that seems to have any bearing on the present case is section 42, which says that if a vessel "hovers" within territorial waters and is found to be conveying "goods dutiable on import" the master and every member of the crew shall be presumed, until the contrary is proved, to have imported "uncustomed goods". "Hover" means (section 2) "to linger without apparent lawful purpose".

In the present case PPc 1230 had no permission from the Comptroller of Customs to carry "dutiable goods" but the prosecution had to prove that the goods she was carrying were "dutiable goods". I assume for the purposes of argument that the actual goods she was carrying were goods of a nature capable of becoming dutiable, but before it could be said they were "dutiable goods" it had to be proved they had been imported.

If, however, the goods were in transit they were not imported within the meaning of the Ordinance unless they were "uncustomed" and they were not "uncustomed" unless there had been a breach of the provisions of the Ordinance in respect of them. Such a breach required to be proved and the provisions of section 42 as to hovering could not avail the prosecution as a substitute for evidence as a means to prove some breach. Although the vessel was carrying goods which would be dutiable if and when imported, the presumption that they were uncustomed did not arise unless the ship was "hovering" and it could not be said to be hovering unless and until it was shown that it was lingering "without apparent lawful purpose". That apparent lack of lawful purpose had to be shown by evidence *aliunde* and until it was made out by evidence the presumption did not arise. It is surely elementary to observe that while a statutory presumption when it arises may operate in place of evidence and so reverse the onus of proof on any point, the bare potential existence of such a presumption cannot of itself dispense with proof of any fact the existence of which is a condition precedent of the presumption arising. To say otherwise would be to fly in the face of all the rules of logic.

Now what was the evidence in this case?

The ship was found at anchor at 10 o'clock in the morning within a few hundred yards of a customs house and the crew were eating their breakfast. They said they had come from Indonesia. They produced an Indonesian Registration Certificate for the ship and there was no reason for disbelieving that they had come from Indonesia. There was no evidence that any

effort had been made to break the cargo far less to disembark any of it. They said they had lost their way during the night and had anchored to await daylight. They said they were on their way to a neighbouring small port in the State of Singapore and a Singapore grocer was called who said the goods on board were intended for him as part of a barter deal between him and a party in Indonesia. It is, I think, common knowledge that there are great difficulties in the way of trade between Indonesia and Singapore which might well account for the lack of any cargo manifest and I think it is equally common knowledge that the Straits of Malacca are by no means free from piracy which might well account for a small ship being anxious to keep as close as possible to the shore of the Federation.

None of the evidence was in controversy. There was nothing even to suggest that the vessel was not in transit in Federation territorial waters, to suggest that she had entered these waters from the High Seas and her intention was to leave them again for the purpose of crossing over to Singapore. There was nothing even to suggest that she was lying at anchor where she was for any purpose other than the lawful purposes of enabling her people to ascertain their whereabouts and eat their breakfast. Had there been anything else, any purpose that involved any sort of fraud on the revenue or anything else unlawful, then a few hundred yards from the customs house at Kukup is the last place one would have expected to find the vessel peacefully lying at anchor in broad daylight.

The case can be summed up by saying that there was no evidence on which it could be said there was an apparent unlawful purpose involved in the vessel lingering; that if there was no apparent unlawful purpose in the lingering then she was not hovering; that if she was not hovering there was nothing to show that the goods on board were uncustomed; that if the goods were not uncustomed and if they were *bona fide* in transit they were not imported; that there was nothing to suggest they were not *bona fide* in transit; that if they were not imported they were not dutiable goods; and that if they were not dutiable goods it was no offence to carry them in a local craft.

In all the circumstances I have no hesitation in allowing the appeal and setting aside the conviction. The fine paid will be refunded and the order of forfeiture in respect of the ship and cargo automatically falls to the ground.

Appeal allowed.

JULAIKA BIVI v. MYDIN

[O.C.S. (Neal J.) June 29, 1961]

[Ipoh — Civil Suit No. 191 of 1960]

Land Laws — New holder of Temporary Occupation Licence — Ejectment of occupier who came into possession with consent of previous holder — Question of trespass.

In his statement of claim the plaintiff, the holder of a Temporary Occupation Licence, alleged that the defendant was in wrongful occupation of a house on the said land and prayed for an order of ejectment plus damages for trespass, costs and ancillary relief. At the time the plaintiff received her Temporary Occupation Licence the defendant was in possession of part of the house, he having been in possession with the consent of the previous holder of the Temporary Occupation Licence. The defendant pleaded that he was in possession.

Held: (1) an action for ejectment in tort will lie at the instance of a holder of a Temporary Occupation Licence against a trespasser;

(2) although as against the original holder of the Temporary Occupation Licence when he went into possession the defendant would never become a trespasser, as against the plaintiff he was a trespasser when the previous title was cancelled with the consent of the holder and a fresh Temporary Occupation Licence issued;

(3) even if the defendant were not a trespasser in land, the plaintiff was entitled to recover possession and mesne profits on the facts and the statement of claim should be amended thus.

The correctness of the defendant's form of pleading doubted.

Hill v. *Tupper* (2) and *Errington* v. *Errington* (7) distinguished, *Mason* v. *Clarke* (3) and *Bristow* v. *Cormican* (4) followed.

Cases referred to:—

(1) *Danford* v. *McAnulty* (1882-3) 8 App. Cas. 456, 458.
(2) *Hill* v. *Tupper* 159 E.R. 51.
(3) *Mason* v. *Clarke* [1955] A.C. 775.
(4) *Bristow* v. *Cormican* (1877-8) 3 App. Cas. 641.
(5) *Glenwood Lumber Co. Ltd.* v. *Phillips*, [1904] A.C. 405.
(6) *H.E. Wijesuria* v. *Attorney-General for Ceylon* [1950] A.C. 493.
(7) *Errington* v. *Errington* [1952] 1 K.B. 290.
(8) *Cobb* v. *Lane* [1952] 1 All E.R. 1199.

CIVIL SUIT.

S. A. Lingam for the plaintiff.
N. H. Chan for the defendant.

Cur. Adv. Vult.

Neal J. (delivering oral judgment): The plaintiff in these proceedings sued the defendant on a statement of claim alleging that she is the licensee of the piece of State land, a full description of which she includes in her statement of claim, that the defendant has been and still is in wrongful occupation of the said house on the land and that despite demands made by the plaintiff upon the defendant he continues to remain in wrongful occupation, and the plaintiff prays for an order of ejectment plus damages for trespass, costs, and ancillary relief.

The defendant in his statement of defence pleads merely that he is in possession.

During the course of the hearing, I drew attention to the form of the statement of defence, and counsel relied upon a decision of the House